IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE H. RAY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 20855

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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I.
JURISDICTIONAL STATEMENT OF FACTS

This case was commenced by the return of an Indictment on September 15, 1965, by the Federal Grand Jury sitting in Tucson, Arizona. (Transcript of Record, Volume One, Item One. Hereinafter Volume One of the Transcript of the Record will be referred to as "RC"; the Transcript of the Testimony at the trial will be referred to as "TR"; the number following

will refer to the page number, and the number following "L" will refer to the line number).

The Indictment charged Appellant Ray with a violation of 8 U.S.C., §1324(a) (2), transporting aliens, in four counts, in that he did transport or move said four aliens in an automobile, within the State and District of Arizona, knowing that said aliens were in the United States of America in violation of law and knowing that their last entry into the United States of America occurred less than three years prior thereto; and with a violation of 8 U.S.C., §1324(a)(4), inducing aliens to enter, in four counts, in that he did wilfully and knowingly, at Agua Prieta, Sonora, Mexico, and at Douglas, State and District of Arizona, (three aliens), and at Naco, Sonora, Mexico, and at Don Luis, State and District of Arizona (one alien), encourage and induce the entry into the United States of America of the said four aliens, said aliens not then and there being lawfully entitled to enter and reside within the United States of America under the terms of the laws and regulations of the United States of America, said Appellant Ray then and there well knowing the foregoing. (RC Item 1.)

On September 28, 1965, Appellant Ray was arraigned and was present with his counsel, at which time he entered a plea of not guilty to each count of the Indictment. Trial was set for November 2, 1965. (RC Item 11).

The trial was not reached until November 3, 1965, and continued November 4 and 5, 1965, at which time the jury found Appellant Ray guilty as charged in all eight counts of the Indictment. (RC Item 11 & 3).

On November 22, 1965, the Court entered its judgment of guilty as to each count and sentenced Appellant Ray to eighteen months. (RC Item 5). The appellant posted bail on appeal in the amount of $3000.00, and presently is at large. This is an appeal pursuant to 28 U.S.C., §1291.

II.
STATEMENT OF FACTS

The testimony offered by the Government at the trial consisted of the four aliens who are named in the Indictment, and in addition, Antonio Teddey, the brother-in-law of Carmen Chavez-Franco, one of the four named aliens, plus the two Border Patrol officers and a female alien.

Three of the aliens testified that the Appellant had come to the brother-in-law of one of them, Antonio Teddey, looking for workers. He was then introduced to the three aliens. One of the aliens informed him directly that he did not have papers and that he only had a border crossing card. The Appellant told each of the three aliens that where they were going to work there would be no danger from Immigration. (TR 24, L 21-22; TR 57, L 6-8; TR 140, L 21-24.) Appellant asked all four aliens to work for a month. (TR 29; 68; 143; 157.)

The fourth alien, who had no border crossing card, he told that there would be no danger of working there at the ranch (from Immigration). (TR 165, L 1-4.) All four aliens testified that they would not have entered if they had not been assured by Appellant that there was no danger. (TR 24; 57; 142; 165.)

On or about July 9, 1965, the Appellant picked up two of the aliens and drove them across the line into Douglas, Arizona, with the aliens using their border crossing cards in the presence of the Appellant (TR 27), to the home of a woman named Cruz and had them wait there while he went back and picked up the third alien, dropped him off just before the port of entry and picked him up again on the American side and drove to the house in Douglas and picked up the remaining aliens and drove them to northern Arizona to a place called Blue, Arizona. (TR 29-34; 59-63; 142-145.) They

worked there at Blue, Arizona, for a period of twenty-one days; they were then picked up by the Immigration officers. (TR 15; 63; 145.)

The fourth alien had just arrived from Naco, Sonora, Mexico, the day before the arrest. The Appellant had gone to him in Naco, Sonora, Mexico, and showed him where he could jump the fence and where he could be picked up by the Appellant on the American side, which was done. (TR 165-166.) This fourth alien, Jose Romero-Siquero, (named in Counts VII and VIII of the Indictment) testified also that he was driven north by Appellant with a female alien named Soledad Chavez (TR 167-168). Soledad Chavez testified to the same effect. (TR 185-186.)

The testimony offered by the Appellant consisted of two of his neighbors, one of whom testified that the Appellant was helping him to repair a truck on the date of the unlawful importation of three of the aliens. (TR 215-266.)

The Appellant himself took the stand, denied that he had driven the aliens to Blue, Arizona, but had merely found them in Blue, Arizona, and had employed them. (TR 285-288.) Appellant also testified that Soledad Chavez was a friend of his wife whom he had driven up to Northern Arizona, and denied picking up Jose Romero-Siquero. (TR 294-295.) He also denied going to the home of Celedino Martinez-Dorame in Agua Prieta, Sonora, Mexico, in October 1965 and asking him to sign a letter disavowing his testimony and that he, the Appellant, would help Celedino if he did so. (TR 325; see also 333-335.)

III.
OPPOSITION SPECIFICATION OF ERRORS RELIED ON

1. The Court did not err in refusing to grant Appellant's Motion for Judgment of Acquittal on Counts I, II and III at the close of Appellant's case.

2. The charge as quoted on pages 4 and 5 of Appellant's Opening Brief is a correct statement of law.

IV.
SUMMARY OF ARGUMENT

1. It is the intent of the alien at the time of entry that fixes the entry as lawful or unlawful.

2. The Court properly charged the jury when, in giving the elements of the offense of inducing, charged that one of the elements was that the Appellant knew the alien was not lawfully entitled to enter or reside within the United States.

V.
ARGUMENT

1. It is the intent of the alien at the time of entry that fixes the entry as lawful or unlawful.

Appellant argues that the entry of the three aliens with the use of the Border Crossing Cards, when they intended to remain in the United States one month to work, was a lawful entry.

8 CFR, §212.6(a), provides:

"A Mexican nonresident alien border crossing card on Form I-186 may be presented as the sole entry

document by a Mexican citizen at a Mexican border port. A Canadian nonresident alien border crossing card on Form I-185 may be presented by a Canadian citizen or British subject residing in Canada to facilitate entry at a United States port. When presented by the rightful holder, Form I-185 and Form I-186 are valid for admission to the United States in accordance with the terms noted thereon."

The terms as noted on the Form I-186 (see Government's Exhibits 1, 2 and 3 in evidence) are that the alien may remain in the United States not more than seventy-two hours and/or may not work in the United States.

As was stated by this Court in *Del Castillo v. Carr,* (9th Cir., 1938), 100 F.2d 338, at p. 341, it is the intent of the alien that fixes the entry as lawful or unlawful. See also *Sleddens v. Shaughnessy,* (2d Cir., 1949), 177 F.2d 363, at p. 364; *United States v. Shaughnessy,* (2nd Cir., 1955), 221 F.2d 262, at p. 264; *Brownell v. Carija,* (D.C. Cir., 1957), 254 F.2d 78.

In *United States v. Orejel-Tejeda,* 194 F.Supp. 140 (1961), cited by Appellant, the entry of the aliens was clearly legal. They had been brought in under valid farm permits. However, in the instant case, the Government's proof was that the intent of the aliens, when they entered, was to remain in the United States to work for one month, and the Appellant knew this and had induced them to enter for that purpose.

It is respectfully submitted the Court did not err in denying the Motion for Directed Verdict of Acquittal on Counts I, II and III, (which, of course, was treated as a Motion for Judgment of Acquittal pursuant to Rule 29(a), Title 18 U.S.C.A., Federal Rules of Criminal Procedure).

2. The Court properly charged the jury when, in giving the elements of the offense of inducing, charged that one of the elements was that the appellant knew the alien was not lawfully entitled to enter or reside within the United States.

The Court, in charging the jury, defined what constitutes an unlawful entry as is quoted on pages 4 and 5 of Appellant's Opening Brief, but went on in its charge to list the elements of offense as follows:

> "Before you may return a verdict of guilty as to the defendant on any of Counts 1, 2, 3 or 7—those are the counts that charge the encouragement and inducing of the aliens to enter the United States—the Government must have established as to the count under consideration, to your satisfaction, from the evidence beyond a reasonable doubt, the following essential elements of the charge made in the count under consideration. First, that on or about the date set out in the count under consideration, the person described in the count under consideration as an alien was in fact an alien. Second, that on or about that date the alien was not lawfully entitled to enter or reside within the United States of America under the terms of the laws and regulations of the United States relating to the immigration or exclusion of aliens. Third, that on or about such date and at the place or places named in the count under consideration, the defendant, knowing that the alien was not lawfully entitled to enter or reside within the United States, wilfully and knowingly encouraged and induced the entry of the alien into the United States. If you find as to any of Counts 1, 2, or 3 or 7, or as to all such counts that the Government has proved each of these essential elements beyond a reasonable doubt, then you may find the defendant guilty as charged in

such count or counts. However, if you find as to any of Counts 1 or 2 or 3 or 7 or all of such counts that the Government has failed to prove by evidence satisfying you beyond a reasonable doubt any of such essential elements, then you will find the defendant not guilty on such count or counts." (TR 365, L 8 — TR 366, L 10.)

Further, in charging the elements of transporting, the Court gave the elements as follows:

". . . Before you may return a verdict of guilty as to the defendant on any of the transportation counts, that is, on any of the Counts 4, 5, 6, or 8, the Government must have established as to the Count under consideration to your satisfaction, from the evidence, beyond a reasonable doubt, the following essential elements of the charge made by the count you have under consideration. First, on or about the date charged in the count under consideration, the person described in such count as an alien, in the United States in violation of law, that the person described under consideration as an alien, was in the United States in violation of law and had last entered the United States within three years prior to such date. Second, that on or about the date charged in the count under consideration, the defendant transported or moved such alien in an automobile between the points in the State of Arizona described in such count. Third, when the defendant transported and moved the alien, he knew that the alien was in the United States in violation of law and he knew that the alien's last entry into the United States occurred less than three years prior to such transportation. And, fourth, that the transportation of such aliens by the defendant was done in furtherance of the alien's violation

of the law, that is, for the purpose of aiding or assisting the alien to remain or continue to stay in the United States in violation of law. If you find as to any of the transportation counts, that is, as to Count 4 or 5 or 6 or 8, or as to all of such counts, that the Government has proved each of these essential elements beyond a reasonable doubt, then you may find the defendant guilty as charged in such count or counts. If, however, you find as to any of these counts or as to all of them that the Government has failed to prove by evidence satisfying you beyond a reasonable doubt any of such essential elements, then you must find the defendant not guilty on such count or counts." (TR 368, L 12 — TR 369, L 21.)

Appellant is not arguing there was not sufficient evidence to return the verdict, but that the essential elements of the offense were not given in the charge. The Appellant's contention is that an entry by an alien with Form I-186, Border Crossing Card, who intends when he enters to remain in the United States longer than seventy-two hours, or who intends when he enters to work in the United States, is still a lawful entry.

8 U.S.C., §1325, provides:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) *obtains entry to the United States* by a willfully false or misleading representation or *the willful concealment of a material fact,* shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished . . ." (Emphasis added)

The Statute for illegal entry as above quoted defines an entry obtained by the willful concealment of the material fact,

in this case, to-wit: that the alien seeking entry intended to remain in the United States longer than seventy-two hours and, in addition, was intending to work. The entry therefore, as defined by the Court in this charge, and as quoted in Appellant's Opening Brief at pages 4 and 5, is an unlawful entry.

VI.
CONCLUSION

It is respectfully submitted that the elements of the offense as charged by the Court are a correct statement of the law and that there was sufficient evidence upon which to return a verdict of guilty on all eight counts.

Respectfully submitted,

WILLIAM P. COPPLE
United States Attorney

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this ...2nd... day of September, 1966, to:

THOMAS J. DAVIS
1008 Phoenix Title Building
Tucson, Arizona
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE H. RAY, Appellant,	)	NO. 20855
vs.	)	PETITION FOR REHEARING
UNITED STATES OF AMERICA, Appellee.	)	

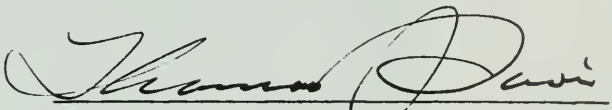
COMES NOW the appellant, by and through his attorney, Thomas J. Davis, and respectfully petitions the Court for rehearing in the above entitled matter, on the grounds and for the reasons that this Court's opinion in the above appeal, at the bottom of Page 3 and at the top of Page 4 reads,

> "The transcript of the proceedings at the time the general sentence was imposed reveals clearly that the District Judge felt that the proper punishment to be inflicted upon the appellant for all offenses of which he was convicted was incarceration for eighteen months."

It is apparent from this language that this Court is of the opinion that the Judge, in making a determination of what sentence was proper under the circumstances, considered the fact that the jury had convicted on eight counts. If, in fact, the jury had only convicted on two counts, the sentence obviously might have been less than eighteen months, although it could have been more than eighteen months.

For these reasons, it is apparent that this Court must consider whether the convictions on Counts 1 through 6 were proper.

Respectfully submitted,



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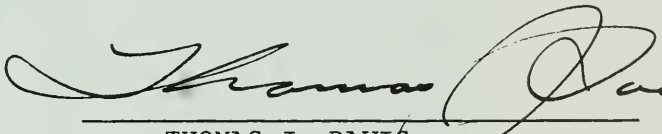
CERTIFICATE

I, Thomas J. Davis, hereby certify that in my judgment, this petition is well founded and is not interposed for the purpose of delay.



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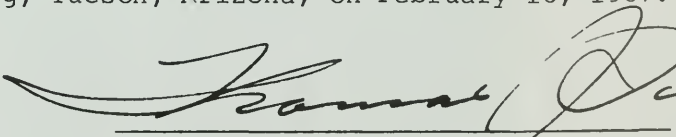
PROOF OF SERVICE

I, Thomas J. Davis, do hereby certify that I caused three copies of this Petition to be served upon the United States Attorney, Federal Building, Tucson, Arizona, on February 16, 1967.



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